GILBERT ENGINEERING CO INC

v.

ZAINUDDIN AHMAD & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-4822-1998]
12 APRIL 2003

CIVIL PROCEDURE: *Affidavits - Defective supporting affidavits in application for summary judgment - Whether inadmissible - Whether summary judgment to be refused - Rules of High Court 1980, O. 3 r. 5(1), O. 14, O. 41 rr. 1(4), 4, O. 92 r.1*

This was an appeal against the decision of the learned registrar refusing to grant summary judgment to the plaintiff. Before the learned judge herein, an issue arose as to whether summary judgment could properly be granted in circumstances where: (i) the plaintiff had only applied for summary judgment about two months after the defence was filed; (ii) the supporting affidavits were replete with substantive and procedural defects; (iii) the affidavits of one Mr. Butters were affirmed in the English language and attached to the affidavits of the plaintiff's solicitor ('Lee') as exhibits; and (iv) no application was made for leave to submit further affidavits pursuant to O. 41 r. 4 Rules of the High Court 1980 ('the RHC').

Held:

[1] Having commenced the suit against the defendants, presumably with instructions to apply for summary judgment supported by affidavits to be secured from the U.S.A, the plaintiff should have prepared all the relevant documents for the expeditious conduct of their case. The plaintiff had failed to discharge the onus on them to show that the 2-month delay was justified under the circumstances. (pp 42 g-i & 43 a)

[2] Lee's affidavits served no greater purpose other than to circumvent O. 92 r. 1 RHC which provided that any document required for use in pursuance of the RHC shall be in Bahasa Malaysia. The proper way for the plaintiff to adduce Butters' affidavits would have been to: (i) have the afidavits affirmed in Bahasa Malaysia before a Malaysian consular officer who would be able to explain the contents of the said affidavits to Butters pursuant to O. 41 r. 12 RHC; or (ii) have the affidavits affirmed in English with the Bahasa Malaysia translation of the same

annexed to an affidavit by a translator verifying the translation. This was however not done. In any case, the RHC has no provision that allows affidavits to be adduced in the form of exhibits, and neither is there any provision to permit a plaintiff to move the court in an O. 14 application through exhibits in support of the application, albeit clothed as affidavits. (pp 43 h-i & 44 a-c)

[2a] The jurat of an affidavit should not begin and end on a fresh page but rather should immediately follow the end of a substantive or spill over of the last substantive averment of the deposition. This is to ensure that there is sufficient indication that the jurat relates directly to the deposition. The onus was on the plaintiff to ensure the authenticity of the affidavits before any dispute arose, and this they failed to do. (p 44 g-h)

[2b] The requirement to state the deponent's residential address in O. 41 r. 1(4) RHC is mandatory and the defect in this respect is a fatal blow to the integrity of the affidavits. (p 45 e)

[2c] The date in para 3 of encl. 8A was rubberstamped as 5 May 1999 without being endorsed with any initials. Further, the dates in paras 4 and 19 of exhs. 'DL1', namely the affidavits of Butters, were also rubber stamped with neither the initial of the deponent nor the Notary Public appended thereto. Similarly, the affidavit filed by Moore on 25 October 1999 bears an illegal amendment and appeared to have been tampered with, as the figure 5 in the date 25th therein was altered by hand but not initialled by the deponent and the Commissioner for Oaths, as is required. These were substantive and not mere procedural defects, and the affidavits hence cannot be allowed to be used to support the O. 14 application. (pp 45 h & 46 a-b)

[3] On its own, perhaps some of the defects in form or format pointed out by the defendant could be explained away or treated as an irregularity. But when the same were considered as a whole, they had the cumulative fatal effect on the plaintiff's summary judgment application as they had occasioned prejudice to the due administration of justice. (p 46 g-h)

[4] In any case, the plaintiff's failure to make any application under O. 41 r. 4 RHC for leave to use the defective affidavits or to apply for an extension of time under O. 3 r. 5(1) RHC, to file further or corrective affidavit, was a glaring omission of recognised procedure. Without such application the court is not empowered to cure the defects. (p 46 d-e)

[Appeal dismissed.]

Case(s) referred to:

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors; Chishty Coveney & Co v. Raja [1997] TLR 698 ***(refd)***

Banque Nationale De Paris v. Wong Hai Ong [2000] 5 MLJ 156 HC ***(refd)***

K & N Kenanga Sdn Bhd v. Latchman Dass Shewaram [1986] 2 CLJ 136; [1986] CLJ (Rep) 388 HC ***(refd)***

Krishnamurthi & Anor v. Malayan Finance Corporation Bhd [1986] 2 MLJ 134 ***(foll)***

McLardy v. Slateum [1980] 24 QBD 504 ***(foll)***

Ngoi Thiam Who v. CTOS Sdn Bhd & Ors [2001] 4 CLJ 765 HC ***(refd)***

Othman Puteh & Anor v. Ku Azman Ku Bahari [2002] 7 CLJ 64 HC ***(foll)***

Perbadanan Nasional Insurance Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(foll)***

Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 CA ***(refd)***

Public Bank Bhd v. Heng Weng Chin & Ors [2002] 3 CLJ 751 HC ***(refd)***

Ratnam v. Cumarasamy [1965] 1 MLJ 228 ***(refd)***

Re CHS [2001] 8 CLJ 653 HC ***(refd)***

Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 CA ***(refd)***

Standard Chartered Bank (M) Bhd v. Eng Song Huat [1996] 2 CLJ 714 HC ***(refd)***

Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 SC ***(refd)***

Voon Mow Chen v. Menteri Dalam Negeri [1993] 4 CLJ 195 HC ***(foll)***

Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor [1999] 5 MLJ 180 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 14, O. 41 rr. 1(4), 4, 10(2), O. 92 r. 1

For the appellant/plaintiff - Haslina Hassan; M/s Zaid Ibrahim & Co
For the respondent/6th defendant - Richard Lee (PG Loke); M/s Cheah Teh & Su

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

Preamble

On 14 June 2002 the learned senior assistant registrar (SAR) allowed the preliminary objections raised by the sixth defendant's solicitor and struck off with costs the plaintiff's application for summary judgment in encl. 8.

Hence this appeal (encl. 61) before me today.

Without going into much detail, suffice to say, the plaintiff's claim against the sixth defendant was for the return of US$617,756.37, being monies received from the plaintiff's customer and wrongfully retained by the sixth defendant and a sum of US$501.37 for goods sold and delivered.

Although at the onset, the sixth defendant raised seven (7) preliminary objections to defeat the plaintiff's application for summary judgment, for the purposes of this appeal, only five (5) of them merit discussion, the total effect of which, in my opinion justified the learned SAR's decision.

The First Preliminary Objection – Delay

The following facts are undisputed. The plaintiff commenced this action against the defendants on 31 December 1998. The sixth defendant entered their appearance and filed their defence by 4 March 1999. The plaintiff only took out their summary judgment application three months after the sixth defendant entered appearance and two months after the filing of the defence.

The plaintiff's explanation for the delay was contained in their supporting affidavits (exh. DL1 encl. 8A and encls. 8b & 44A). The plaintiff needed time, not only to instruct their solicitors and forward documents but also to coordinate and prepare the supporting affidavits as the plaintiff was based in the United States of America (U.S.A.) whilst the deponents of the supporting affidavits were in both U.S.A. and Australia. In light of these circumstances, the plaintiff sought to persuade this court, that the delay was not inordinate. I am mindful that delay in recourse to a summary judgment application is not *per se* fatal.

Aside from the fact that the sixth defendant was disputing the admissibility of the supporting affidavits, the sixth defendant maintained that the explanation on the delay forwarded by the plaintiff was unacceptable.

On the delay, I am in agreement with the sixth defendant, as I am bound to follow the decision of the Supreme Court in *Krishnamurthi & Anor v. Malayan Finance Corporation Bhd* [1986] 2 MLJ 134. Having commenced the suit against the defendants, presumably with instructions to apply for summary judgment supported by affidavits to be secured from U.S.A., the plaintiff should have prepared all the relevant documents for the expeditious conduct of their case.

This is of material consideration in the light of the present day litigation culture which enjoins speedy disposal of cases. The plaintiff had failed to discharge the onus on them to show that the delay was justified under the circumstances of their case. (See *McLardy v. Slateum* [1980] 24 QBD 504, *K&N Kenanga Sdn Bhd v. Latchman Dass s/o Shewaram* [1986] 2 CLJ 136; [1986] CLJ (Rep) 388, *Standard Chartered Bank (M) Bhd v. Eng Song Huat* [1996] 2 CLJ 714 and *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424 (CA).)

The Second Preliminary Objection – English Affidavits

What is more pivotal to my decision is the sixth defendant's objection to the admissibility of all the affidavits affirmed by David Lee Kim Meng (Lee), the plaintiff's solicitor, (encls. 8A, 9, 10, 23, 26, 33C, 35 and 44) and the affidavits of Evert Alan Butters (Butters) exhibited in the former's affidavits (exh. 'DL1' of encl. 8A, exh. 'DL2' of encl. 9, exh. 'DL2' of encl. 10, exhs. 'DLA' of encl. 23, exh. 'DL4' of encl. 26, exh. 'DL5' of encl. 33C, exh. 'DL6' of encl. 35 and exh. 'DL A' of encl. 44).

All of Butters' affidavits were affirmed in English with an unaffirmed copy of the same in Bahasa Malaysia attached thereto. These affidavits were annexed to Lee's affidavits as exhibits.

The plaintiff's strategy in adducing Butters' affidavits as exhibits seemed to be two pronged. Firstly, through Lee's affidavits, they explained that neither Butters nor the notary public, before whom he affirmed the affidavits, understood Bahasa Malaysia. Hence, the need to file Butters' affidavits in English and the plaintiff – quite cleverly, they thought – in compliance with O. 41 r. 10(2) of the Rules of the High Court 1980 (RHC), paid the praecipe fee for all of Butters' affidavits.

Secondly, the plaintiff sought to rely on the proviso to O. 92 r. 1 RHC which is as follows:

> Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

Ingenious as the plaintiff's approach was, I found it flawed and misconceived for several reasons.

Lee's affidavits served no greater purpose other than to circumvent O. 92 r. 1 RHC which provided that any document required for use in pursuance of the RHC shall be in Bahasa Malaysia. (See *Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729 and s. 8 National Language Act 1965/67.)

Order 92 r. 1 RHC is a mandatory provision. The proper way for the plaintiff to adduce Butters' affidavits would have been to:

(i) have the affidavits affirmed in Bahasa Malaysia before a Malaysian consular officer, who would have been able to explain the contents of the said affidavits to Butters; pursuant to O. 41 r. 12 RHC; or

(ii) have the affidavits affirmed in English with the Bahasa Malaysia translation of the same annexed to an affidavit by a translator verifying the translation.

The RHC has no provision that allows affidavits to be adduced in the form of exhibits, and neither is there any provision to permit a plaintiff to move the court in an O. 14 application through exhibits in support of the application, albeit clothed as affidavits. To allow such affidavits to be read in support of the plaintiff's summary judgment application would run counter to the grain of the pertaining provision itself.

It is trite law that a summary judgment application must be supported by an affidavit, verifying the facts on which the claim was based. As such, it should not be allowed to be converted from a contest of affidavits to a contest of exhibits.

The Third Preliminary Objection – Jurat

The sixth defendant also maintained that the plaintiff's affidavits, namely, exh. 'DL1' of encl. 8A, encl. 8a, encl. 28 and exh. 'DL5' of encl. 33C, were defective because the jurat in these affidavits did not immediately follow the spill over from the last substantive averment.

I had occasion to express the following view in respect of this issue in *Voon Mow Chen v. Menteri Dalam Negeri* [1993] 4 CLJ 195:

> It is this Court's view that the reason that the jurat of an affidavit should not begin and end on a fresh page but rather should immediately follow the end of a substantive or spill over of the last substantive averment of the deposition, is in order to ensure that there is sufficient indication that the jurat relates directly to the deposition. This is to obviate the possibility of abuse by any party …

I find no reason to change that view. The onus was on the plaintiff to ensure the authenticity of the affidavits before any dispute arose, and this they failed to do.

Though, in respect of the aforesaid defect in form or format it is open to the plaintiff to apply for leave of the court under O. 41 r. 4 to use such defective affidavit in evidence, yet the onus rests on them to make out a cogent case for such leave, which could be granted, depending on the nature and number of and the reasons for such non compliance of form or format. In my opinion, r. 4 of this provision may not be invoked to cure a defect or error in the substantive averments of the affidavit which go to the root of the affidavit, as this rule does not empower the court with any such discretion.

The proper recourse in such cases is to apply for leave (if time has expired) under O. 3 r. 5(1) to file a further or corrective affidavit, as recommended in *Perbadanan Nasional Insurance Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 (CA).

The Fourth Preliminary Objection – Residential Address

The sixth defendant also drew the court's attention to encls. 8A, 8b and exh. 'DL1' of encl. 8A; that is, the first supporting affidavits for the plaintiff's summary judgment application affirmed by Lee, Bruce Moore (Moore) and Butters respectively.

The deponents failed to state their residential addresses as required under O. 41 r. 1(4) RHC. This requirement is mandatory and the plaintiff's submission that the deponents had stated their residential addresses in subsequent affidavits did not find favour with me. This defect delivers a fatal blow to the legal integrity of the affidavits, considering that Lee's affidavit was being used as a vehicle to adduce Butters' affidavit. (See *Perbadanan Nasional Insurance Sdn Bhd v. Pua Lai Ong (supra)*, *Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor* [1999] 5 MLJ 180 and *Ngoi Thiam Who v. CTOS Sdn Bhd & Ors* [2001] 4 CLJ 765).

The Fifth Preliminary Objection – Defect In Substance

More importantly, defects of substance and not of form only were also detected. The plaintiff's solicitor filed several affidavits, affirmed on 5 May 1999 (encl. 8A), 24 June 1999 (encl. 9), 1 October 1999 (encl. 26), 21 December 1999 (encl. 33C) respectively and another affidavit which bore no affirmation date but was filed on 21 July 1999 (encl. 10). The date in para. 3 of encl. 8A was rubber stamped as 5 May 1999 without being endorsed with any initials.

Further, the dates in paras. 4 and 19 of exh. 'DL1' (affidavit of Butters) of encl. 8A were also rubber stamped 30 April 1999 with neither the initials of the deponent nor the Notary Public appended thereto. Similarly, the date in para. 4 of exh. 'DL5' (affidavit of Butters) of encl. 33C had been amended by hand without such endorsements.

I am also mindful of another affidavit sworn by Moore, filed on 25 October 1999. This affidavit bears an illegal amendment and appeared to have been tampered with, as the figure 5 in the date 25 was altered by hand but was not initialled by the deponent and the Commissioner of Oaths, as is required. This being so, even if an application had been made for leave to use this affidavit under O. 41 r. 4 RHC it should not be allowed by the court due to the gravity of its culpability and the fact that it is a defect in substance rather than form. Thus, it may be observed that a truly kaleidoscopic patchwork of errors has occurred in the getting up and management of the application for summary judgment.

Other Considerations

The fact that the plaintiff went to the trouble of affirming a corrective affidavit (encl. 44A), clearly showed that the plaintiff had sufficient notice of the preliminary objections raised by the sixth defendant. In light of the number of preliminary objections raised by the sixth defendant, to say the least, the plaintiff's failure to make any application under O. 41 r. 4 RHC, for leave of the court to use the defective affidavits (except in passing, as an afterthought, in the written submission before me) or to apply for an extension of time under O. 3 r. 5(1) RHC, to file further or corrective affidavits, was a glaring omission of recognised procedures. Without such application, this court is not empowered to cure the defects, particularly at its own instance. (See *Perbadanan Nasional Insurance Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 (CA), *Re CHS* [2001] 8 CLJ 653 and *Banque Nationale De Paris v. Wong Hai Ong* [2000] 5 MLJ 156.)

The plaintiff could not rely on O. 1A or O. 2 r. 3 RHC (Amendment) 2002 which came into effect on 16 May 2002 as the plaintiff's defects in form or format predated the amendments. (See *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491 (CA).)

Conclusion

The end result of the sixth defendant's various challenges was not favourable to the plaintiff. On its own, perhaps some of the defects in form or format pointed out by the sixth defendant could be explained away or treated as an irregularity. But when the same were considered as a whole, they had the cumulative fatal effect on the plaintiff's summary judgment application as they have occasioned prejudice to the due administration of justice.

I reiterate the view I expressed in *Othman Puteh & Anor v. Ku Azman Ku Bahari* [2002] 7 CLJ 64 at 67:

> I am conscious of the approach that I should take in a preliminary objection on matters of form or procedure. Such preliminary objections should not normally be held to prevail over the merits of the case unless there is blatant infringement of the rules and **such infringement has occasioned prejudice** to the adverse party or **to the due administration of justice** … if the infringement is significant and the culpability is of a high degree, the court cannot overlook such conduct without also condoning it and thereby encouraging non-observance and total disregard of clearly expressed rules in general which are meant to be observed. (emphasis added).

(See *Ratnam v. Cumarasamy* [1965] 1 MLJ 228, *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors, Chishty Coveney & Co v. Raja* [1997] TLR 698 and *Public Bank Bhd v. Heng Weng Chin & Ors* [2002] 3 CLJ 751.)

The crux of my ratiocination is as follows.

The plaintiff had attempted to use what were essentially exhibits, as affidavits in support of their application, which is not permissible under the RHC. The sole affidavit tendered in support of the O. 14 application was the affidavit sworn by the lawyer, *albeit* the three affidavits of the plaintiff sworn in English were put in as exhibits but purported to be affidavits in support.

If the three exhibits were intended to be used as affidavits they were invalid as affidavits, for being made in breach of O. 92 r. 1 RHC. Yet, the plaintiff had sought to use such exhibits as affidavit in support of the O. 14 application. The only proper affidavit filed in connection with the O. 14 application by the plaintiff is the affidavit by Moore, the managing director in Australia, affirmed in Malaysia on 23 November 1999 (encl. 30); but this affidavit was not an affidavit in support of the application for summary judgment but merely an affidavit in reply to one or two points raised by the sixth defendant in their affidavit affirmed on 9 November 1999.

After careful consideration of all the affidavits and submissions put in by both sides and for all the above various and variegated reasons, I decided to dismiss the plaintiff's appeal in encl. 61 with costs.

A final observation which I wish to make is that, to my amazement, against its own vital interests, the plaintiff has now filed an appeal to the Court of Appeal against this eminently interim decision, which merely involves affidavits to be used in an O. 14 application. The plaintiff could not have been unmindful, if well advised, that a very substantial delay in the prosecution of its claim would result, considering that that appeal would, after considerable time lapse, only resolve the question as to whether the said impugned affidavits could be used in the O. 14 application. Then, should the plaintiff's appeal be allowed

by the Court of Appeal and summary judgment is also allowed by the SAR, an appeal by the sixth defendant to the judge in chambers is envisaged, and (if dismissed) yet another appeal to the Court of Appeal would follow. This, surely, would work to the unexpected benefit and utter joy of the sixth defendant. It is rather, a strange situation, where a defendant is continually happy to be consistently unsuccessful on interlocutories, since the legislative amendment on the word 'decision' has yet to be implemented in civil proceedings. The nation would not survive as a financial entity if the administration of justice grinds to a halt through being clogged up by the sheer weight of unnecessary and frivolous appeals. Thus, the right of every subject to have recourse to the courts must be placed in the scales with the legitimate expectation that the nation shall survive economically for the subject.